

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EDWARD J. MOTTA,

Petitioner,

v.

JEFFREY BEARD,

Respondent.

Case No.: 3:14-cv-03021-BEN-KSC

ORDER:

- (1) ADOPTING REPORT AND RECOMMENDATION;**
- (2) DENYING PETITION; and**
- (3) DENYING CERTIFICATE OF APPEALABILITY**

Petitioner Edward Motta, a California prisoner proceeding pro se, filed a Petition for Habeas Corpus pursuant to 28 U.S.C § 2254. (Docket No. 1.) The Magistrate Judge issued a thorough and thoughtful Report and Recommendation (“R&R”) recommending habeas relief be denied. (Docket No. 25.) Petitioner filed Objections to the Report. (Docket No. 28.) For the reasons stated below, the Report and Recommendation is

ADOPTED, and the Petition is **DENIED**.

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BACKGROUND

Petitioner was convicted of attempted murder, assault, making a criminal threat, false imprisonment, resisting an officer, burglary, and battery based on three incidents between Petitioner and his then-girlfriend. He was sentenced to 75 years-to-life plus 20 years in state prison.

Petitioner appealed his conviction. The California Court of Appeal affirmed. He then filed a petition for review in the Supreme Court of California. That petition was denied.

The R&R recommends that Petitioner’s claims be denied. Petitioner makes four objections to the R&R. First, he objects to the finding that he received constitutionally effective representation. Second, he objects to the Report’s finding that an evidentiary hearing was not necessary. Third, Petitioner argues that the Magistrate Judge failed to “independently review the record pursuant to Federal Habeas Corpus Rule 11.” Fourth, he contends that the Magistrate Judge erred in finding that the trial court did not abuse its discretion in denying his mid-trial request for self-representation.

STANDARD OF REVIEW

I. Report and Recommendation

Where a timely objection to a report and recommendation has been filed, the district court reviews *de novo* those portions of the report or specific proposed findings or recommendations to which the petitioner objected. 28 U.S.C. § 636(b)(1).

II. Petition for Habeas Corpus

A Petition for Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”); *see Lindh v. Murphy*, 521 U.S. 320, 337 (1997). AEDPA states that a habeas petition will not be granted with respect to any claim adjudicated on the merits in state court proceedings unless that adjudication either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an

1 unreasonable determination of the facts in light of the evidence presented in the state
 2 court proceeding. 28 U.S.C. § 2254(d). A federal court engages in extraordinarily
 3 deferential review of the state court's determination, and only looks to see whether the
 4 state court's decision was objectively unreasonable. *See Yarbrough v. Gentry*, 540 U.S.
 5 1, 4 (2003); *Medina v. Hornung*, 386 F.3d 872, 877 (9th Cir. 2004). When there is no
 6 reasoned decision from the state's highest court, the court "looks through" to the
 7 underlying appellate court decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991).

8 The Supreme Court has stated that a federal habeas court "may issue the writ under
 9 the 'contrary to' clause if the state court applies a rule different from the governing law
 10 set forth in our cases, or if it decided a case differently than we have done on a set of
 11 materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002). Relief under
 12 the "unreasonable application" prong is only granted where the governing law was
 13 correctly identified, but was applied to the facts in an "objectively unreasonable manner."
 14 *Id.* As to § 2254(d)(2), "factual determinations by state courts are presumed correct
 15 absent clear and convincing evidence to the contrary . . . , and a decision adjudicated on
 16 the merits in a state court and based on a factual determination will not be overruled on
 17 factual grounds unless objectively unreasonable in light of the evidence presented in the
 18 state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

19 DISCUSSION

20 I. ***De Novo* Review of the Petition**

21 The Court has reviewed the record in this case, and addresses Petitioner's
 22 objections in turn.

23 **A. Effective Assistance of Counsel**

24 Petitioner objects that his trial counsel was ineffective by failing to fully
 25 investigate whether the victim's hyoid bone, a bone in the neck, was fractured. He
 26 contends that a full investigation would have uncovered medical experts who could have
 27 refuted the testimony of Dr. James Schwendig, the trauma surgeon who treated the victim

1 and testified that her hyoid bone was fractured. He also contends that a more thorough
 2 investigation would have led to a more effective cross-examination of Dr. Schwendig.

3 The Court of Appeal found that Petitioner received constitutionally effective
 4 representation. The Report and Recommendation found that the Court of Appeal's
 5 decision, the last reasoned decision, was not contrary to, nor an unreasonable application
 6 of, clearly established federal law, and was not based on an unreasonable determination
 7 of the facts in light of the evidence presented in the state court proceedings. Having
 8 conducted a *de novo* review, this Court agrees.

9 Under *Strickland v. Washington*, a petitioner must demonstrate that: (1) defense
 10 counsel's performance was deficient; and (2) this deficient performance was prejudicial.
 11 466 U.S. 668, 690-92 (1984). Because of the difficulties inherent in evaluating the
 12 performance of counsel after the fact, a court must indulge a strong presumption that
 13 counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at
 14 689. On federal habeas review, this Court must take "a 'highly deferential' look at
 15 counsel's performance through the 'deferential lens of § 2254(d).'" *Cullen v. Pinholster*,
 16 563 U.S. 170, 189 (2011). "The question 'is not whether a federal court believes the state
 17 court's determination' under the *Strickland* standard 'was incorrect, but whether that
 18 determination was unreasonable—a substantially higher threshold.'" *Knowles v.*
 19 *Mirzayance*, 556 U.S. 111, 123 (2009). "Put differently, [the court] ask[s] not 'whether
 20 counsel's actions were reasonable' but whether there is any reasonable argument that
 21 counsel satisfied *Strickland*'s deferential standard." *Hibbler v. Benedetti*, 693 F.3d 1140,
 22 1150 (9th Cir. 2012). Petitioner "must show that the [state court] applied *Strickland* to
 23 the facts of his case in an objectively unreasonable manner." *Bell*, 535 U.S. at 699.

24 As explained in more detail in the R&R, in evaluating Petitioner's ineffective
 25 assistance of counsel claim, the Court of Appeal determined that Petitioner's trial counsel
 26 did not conduct an inadequate investigation of the hyoid bone issue. Trial counsel spoke
 27 to two medical professionals to investigate the hyoid bone injuries and may have spoken
 28 to Dr. Schwendig. Trial counsel also effectively cross-examined Dr. Schwendig, causing

1 him to admit he was unable to determine how the victim's hyoid bone was fractured, to
 2 agree the fracture could have been caused by a fall, to admit he could not determine when
 3 the bone had been broken, and to state that the swelling in the victim's neck was the
 4 potentially life-threatening aspect of her injuries, not the broken hyoid bone.

5 The Court of Appeal also went on to explain that, even assuming arguendo that
 6 trial counsel's actions fell below prevailing professional norms because she did not
 7 present expert medical evidence to counter Dr. Schwendig's testimony, Petitioner could
 8 not show he was prejudiced by that failure in light of the overwhelming evidence against
 9 Petitioner. The prosecution presented eyewitness testimony, testimony from the victim,
 10 evidence regarding the extent of the victim's injuries from the responding paramedic and
 11 treating physician, and physical evidence from the crime scenes to support the
 12 convictions. Moreover, Petitioner's own psychiatric expert admitted that Petitioner's
 13 version of one of the incidents was "nonsensical." Thus, considering the sum of
 14 evidence, there is no reasonable probability that had trial counsel investigated further and
 15 put on medical experts at trial to rebut Dr. Schwendig, the jury would not have returned
 16 guilty verdicts.

17 Based on this record, the Court of Appeals decision was not objectively
 18 unreasonable. The court correctly rejected Petitioner's claim of ineffective assistance of
 19 counsel. Accordingly, Petitioner's objection is **OVERRULED**.

20 **B. Evidentiary Hearing**

21 Petitioner objects to the R&R's determination that an evidentiary hearing is neither
 22 necessary nor warranted. Petitioner requested an evidentiary hearing on all four of his
 23 claims, but his Objection appears to be directed to the denial of an evidentiary hearing
 24 regarding his trial counsel's alleged failure to investigate the hyoid bone fracture fully.

25 An evidentiary hearing is not necessary where the federal claim can be denied on
 26 the basis of the state court record. *Campbell v. Wood*, 18 F.3d 662, 679 (9th Cir. 1994).
 27 And where a petitioner has failed to develop the factual basis of a claim in state court
 28 proceedings, he is not entitled to an evidentiary hearing unless he shows that (1) the claim

1 relies on (i) a new rule of constitutional law or (ii) a factual predicate that could not have
 2 been previously discovered through the exercise of due diligence, and (2) he establishes
 3 by clear and convincing evidence that but for the constitutional error no reasonable jury
 4 would have found him guilty. 28 U.S.C. § 2254(e)(2).

5 The Court agrees that no evidentiary hearing is necessary in this case. As
 6 discussed above, Petitioner's claim of ineffective assistance of counsel with respect to the
 7 hyoid bone issue can be rejected based on the state court record. Furthermore, Petitioner
 8 has not come forward with a new rule of constitutional law or newly discovered evidence
 9 and established by clear and convincing evidence that no reasonable factfinder would
 10 have found him guilty. In light of the sum of evidence discussed above and in the R&R,
 11 medical testimony that the victim's hyoid bone was not fractured would not have raised a
 12 reasonable doubt sufficient to undermine Petitioner's convictions. Accordingly,
 13 Petitioner's objection is **OVERRULED**.

14 **C. Error by Magistrate Judge Crawford**

15 Petitioner's third objection is not entirely clear. Although his objection is titled as
 16 an objection "to the Magistrate's failure to independently review the record pursuant to
 17 Federal Habeas Corpus Rule 11," his argument addresses issues of harmless error and
 18 refers to his Petition, in which he argues that the failure to have a jury determine whether
 19 his prior convictions were strikes under California law was *not* harmless error. To the
 20 extent Petitioner argues that Magistrate Judge Crawford did not review the record of the
 21 state court proceedings, this Court disagrees. The R&R provides a thorough and detailed
 22 analysis of the underlying proceedings. To the extent Petitioner argues that Magistrate
 23 Judge Crawford failed to determine whether any error under *Apprendi v. New Jersey*, 530
 24 U.S. 466 (2000), was harmless, he misreads the R&R. The R&R clearly states that "even
 25 if there is *Apprendi* error here, federal habeas relief is not available because any error is
 26 clearly harmless." (R&R at 42.) The R&R then supplies detailed reasoning for this
 27 conclusion. Therefore, Petitioner's objection is **OVERRULED**.

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1 **D. Self-Representation**

2 Petitioner objects to the trial court's denial of his mid-trial request to represent
3 himself. He contends that there was no finding that the Government would be prejudiced
4 by the timing of his request and, without such a finding, the other reasons provided in
5 denying the request were without merit and insufficient.

6 The Court of Appeal held that Petitioner's motion was untimely and concluded that
7 the trial court did not abuse its discretion in denying the motion. The Court of Appeal
8 found that granting Petitioner's motion would cause disruption and delay the case.

9 The R&R concluded that the Court of Appeal's conclusion was objectively
10 reasonable. Clearly established federal law provides that a criminal defendant has a
11 constitutional right to self-representation, and a State violates that right when it forces
12 him to accept a state-appointed attorney after he knowingly and intelligently waives his
13 Sixth Amendment right to counsel and clearly and unequivocally declares a desire to
14 represent himself. *Farett v. California*, 422 U.S. 806, 819-36 (1975). A *Farett* request
15 must be knowing and intelligent, unequivocal, timely, and not for purposes of delay. *See*
16 *id.* at 835; *Stenson v. Lambert*, 504 F.3d 873, 882 (9th Cir. 2007).

17 The Court agrees that the state court's conclusion that Petitioner's request was
18 untimely and was meant for the purpose of delay was an objectively reasonable
19 application of clearly established law. Petitioner's request came in the middle of trial
20 near the close of the prosecution's case and one and one-half years after arraignment. *See*
21 *Stenson*, 504 F.3d at 879, 884-885 (affirming denial of *Farett* request made near the end
22 of jury selection as untimely). Furthermore, as explained more fully in the R&R,
23 Petitioner's request was equivocal because it was predicated on the trial court's refusals
24 of his multiple requests to replace retained counsel. *See id.* at 883 ("A clear preference
25 for receiving new counsel over representing oneself . . . may . . . be an indication that the
26 request, in light of the record as a whole, is equivocal."). Petitioner had never before
27 requested to represent himself, and his *Farett* request was made only after the repeated
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1 denials of his requests for new counsel. These considerations weigh against finding
2 Petitioner's request to be unequivocal. *See id.* at 882.

3 Therefore, this Court finds that the Court of Appeal's rejection of Petitioner's
4 claim is neither contrary to, nor involves an unreasonable application of, clearly
5 established federal law, and is not based on an unreasonable determination of the facts in
6 light of the state court record. Accordingly, Motta's objection is **OVERRULED**.

7 **II. Certificate of Appealability**

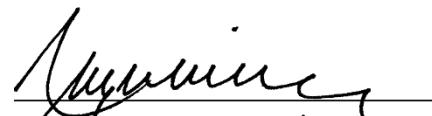
8 The Court **DENIES** a certificate of appealability because the issues are not
9 debatable among jurists of reason and there are no questions adequate to deserve
10 encouragement. *See Miller-El*, 537 U.S. at 327.

11 **III. Conclusion**

12 The R&R is **ADOPTED** over Petitioner's Objections. The Petition is **DENIED**.
13 A Certificate of Appealability is **DENIED**. The Clerk shall close the case.

14 **IT IS SO ORDERED.**

16 Dated: July 26, 2016


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18 Hon. Roger T. Benitez
19 United States District Judge

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